

## **Subject Index**

	<b>Page</b>
Questions presented .....	<b>1</b>
Statutory provisions involved .....	<b>2</b>
Statement of the case .....	<b>5</b>
Summary of argument .....	<b>6</b>
Argument .....	<b>10</b>

### **I**

California Labor Code §229 precluding compulsory arbitration of individual wage disputes is consistent with federal law; in no way interferes with federal rules and policies relating to the regulation of securities; and neither federal law nor the rules of the New York Stock Exchange operate to preempt such state legislation .....	<b>10</b>
--	-----------

A. The application of California Labor Code §229 to the present controversy is compatible with federal securities legislation and is not preempted by such laws .....	<b>10</b>
---	-----------

B. California Labor Code §229 is consonant with federal law .....	<b>30</b>
---	-----------

### **II**

California Business and Professions Code Section 16600 does not interfere with Federal policies concerning the regulation of the securities industry .....	<b>38</b>
--	-----------

### **III**

The California legislation herein challenged does not constitute an undue burden on interstate commerce ..	<b>51</b>
Conclusion .....	<b>57</b>

## Table of Authorities Cited

Cases	Pages
A. & E. Plastik Pak Co. v. Monsanto Co., 396 F.2d 710 (9th Cir. 1968) .....	50
Allen v. Alleghany Co., 196 U.S. 458 (1905) .....	33
Allstate Insurance Co. v. Lanier, 361 F.2d 870 (4th Cir. 1966) .....	27
Alpha Beta Mkts. v. Amal. Meat Cutters, 147 Cal.App.2d 343, 305 P.2d 163 (1956) .....	36
American Safety Equipment Corp. v. J. P. Maguire & Co., 391 F.2d 821 (2nd Cir. 1968) .....	50
Anderson v. Shipowners' Ass'n. of Pacific Coast, 272 U.S. 359 (1926) .....	40
Associated Milk Dealers v. Milk Drivers Union Local 753, 422 F.2d 546 (7th Cir. 1970) .....	50
Association of Westinghouse Salaried Employees v. West- inghouse Electric Corporation, 348 U.S. 437 (1954)....	8, 30, 31
Axelrod & Co. v. Kordich, Victor & Neufeld, 320 F.Supp. 193 (S.D. N.Y. 1970), Aff'd 451 F.2d 838 (2d Cir. 1971) .....	13, 14, 17
Ayres v. Merrill Lynch, CCH Fed. Sec. Law Rep. ¶93742 (E.D., Pa. 1973) .....	17, 19, 31
Bernhard v. Bank of America, N.T. & S.A., 19 Cal.2d 807, 122 P.2d 892 (1942) .....	35
Bernhardt v. Polygraphic Co. of America, Inc., 350 U.S. 198 (1956) .....	34
Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959).....	55
Blonder-Tongue Lab., Inc. v. University of Illinois Found'n, 402 U.S. 313 (1971) .....	35
Boyd v. Grand Trunk Western R.R. Co., 338 U.S. 263 (1949) .....	20
Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945)....	20
Brotherhood of Locomotive Firemen & Enginemen v. Chi- cago, Rock Island & Pacific Railroad Co., 393 U.S. 129 (1968) .....	25, 52
Brown v. Gilligan, Will & Co., 287 F.Supp. 766 (S.D. N.Y. 1968) .....	17, 18, 19, 20
Buskuhl v. Family Life Ins. Co., 271 Cal.App.2d 514, 76 Cal.Rptr. 602 (1969) .....	33

# TABLE OF AUTHORITIES CITED

iii

	Pages
California v. F.P.C., 369 U.S. 482 (1962) .....	43
Carnation Co. v. Pacific Westbound Conf., 383 U.S. 213 (1966) .....	42, 44
City of Ukiah v. Fones, 64 Cal.2d 104, 410 Pac.2d 360 (1966) .....	11
Coenen v. R. W. Pressprich & Co., 453 F.2d 1209 (2nd Cir.), cert. denied, 406 U.S. 949 (1972) .....	15, 17, 19
Collins v. American Buslines, 350 U.S. 528 (1956) .....	54, 55
Colonial Realty Corp. v. Bache & Co., 358 F.2d 178 (2nd Cir. 1966) cert. denied, 385 U.S. 817 (1966) .....	17
Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc., 372 U.S. 714 (1963) .....	24, 54
Davis v. Jointless Fire Brick Co., 300 Fed. 1 (9th Cir. 1924) .....	33, 38
Day-Brite Lighting, Inc., Compeco Corp. v. Missouri, 342 U.S. 421 (1952) .....	25
Dickstein v. duPont, 320 F.Supp. 150 (D.Mass. 1970), aff'd 443 F.2d 783 (1st Cir. 1971) .....	17, 19
Duncan v. Thompson Trustee, 315 U.S. 1 (1942) .....	20
E. W. Wiggins Airways, Inc. v. Massachusetts Port Au- thority, 362 F.2d 52 (1st Cir. 1966) .....	27
Federal Baseball Club v. National League, 259 U.S. 200 (1922) .....	46
Flood v. Kuhn, 407 U.S. 258 (1972) .....	45, 46, 53
Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) .....	8, 22, 23, 24, 54, 55
Fox Film Corp. v. Muller, 296 U.S. 207 (1935) .....	56
Frame v. Merrill Lynch, 20 Cal.App.3d 668, 97 Cal.Rptr. 811 (1971) .....	6, 34, 35, 36, 38
General Electric Co. v. Local 205, et al., 353 U.S. 547 (1957) .....	37
George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir. 1970) .....	27
Georgia v. Pennsylvania R.R. Co., 324 U.S. 439 (1945) .....	43
Haywood v. National Basketball Association, 401 U.S. 1204 (1971) .....	46
Head v. New Mexico Board of Examiners in Optometry, 374 U.S. 424 (1963) .....	10, 24, 54

	Pages
Hines v. Davidowitz, 312 U.S. 52 (1941) .....	21, 22
Hughes Tool Co. v. Trans World Airlines, Inc., U.S. ....	
—, 93 S.Ct. 647 (1973) .....	42, 44, 45
Huron Portland Cement Co. v. City of Detroit, 362 U.S. ....	
440 (1960) .....	52, 53
Isaacson v. Hayden, Stone, Inc., 319 F.Supp. 929 (S.D. ....	
N.Y. 1970) .....	17, 19
Kelly v. Kosuga, 358 U.S. 516 (1959) .....	9, 36
Lincoln Federal Union v. Northwestern Iron & Metal Co., ....	
335 U.S. 525 (1949) .....	25
Loving & Evans v. Bliet, 33 Cal.2d 603, 204 P.2d 23 (1949) ....	36
Maheu v. Reynolds & Co., 282 F.Supp. 423 (S.D. N.Y. 1967) ....	15
Matter of Aimee Wholesale Corp., 21 N.Y.2d 621, 237 N.E. ....	
2d 223 (1968) .....	50
Muggill v. Reuben H. Donnelly Corp., 62 Cal.2d 239, 398 ....	
P.2d 147 (1965) .....	38, 39
Northern Pacific R.R. Co. v. United States, 356 U.S. 1 ....	
(1958) .....	28, 44
Northern Securities Co. v. United States, 193 U.S. 197 ....	
(1904) .....	43
Otter Tail Power Co. v. United States, 409 U.S. 820 (1973) ....	43
Pan American World Airways, Inc. v. United States, 371 ....	
U.S. 296 (1963) .....	42, 44
Paramount Famous Lasky Corp. v. U.S., 282 U.S. 30 (1930) ....	56
Parker v. Brown, 317 U.S. 341 (1943) .....	8, 26, 27, 52, 53
Pawgan v. Silverstein, 265 F.Supp. 878 (S.D. N.Y. 1967) ....	15
Perez v. Campbell, 402 U.S. 637 (1971) .....	21, 22
Philadelphia, Baltimore & Washington R.R. Co. v. Schubert, ....	
224 U.S. 603 (1912) .....	16, 20
Player v. Geo. M. Brewster & Son, Inc., 18 Cal.App.3d 526, ....	
96 Cal.Rptr. 149 (1971) .....	32
Power Replacements, Inc. v. Air Preheater Co., 426 F.2d ....	
980 (9th Cir. 1970) .....	50
Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. ....	
395 (1967) .....	8, 31, 32, 37
Prudential Insurance Co. v. Benjamin, 328 U.S. 408 (1946) ....	57

# TABLE OF AUTHORITIES CITED

iv

	Pages
Radovich v. National Football League, 352 U.S. 445 (1957)	46
Reader v. Hirsch & Co., 197 F.Supp. 111 (S.D. N.Y. 1961)	7, 15
Revenue Properties Litigation Cases v. Cohn, Delaire & Kaufman, 451 F.2d 310 (1st Cir. 1971)	17, 19
Ricci v. Chicago Mercantile Exchange, U.S. , 98 S.Ct. 573 (1973)	9, 48, 49
Rust v. Draxel Firestone, Inc., 352 F.Supp. 715 (S.D. N.Y. 1972)	14, 17, 19
San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959)	23
Shapiro v. Jaslow, 320 F.Supp. 598 (S.D. N.Y. 1970)	15
Silver v. New York Stock Exchange, 373 U.S. 341 (1963)	7, 9, 12, 18, 28, 29, 30, 40, 41, 45, 46, 47, 56
Silvercup Bakers, Inc. v. Fink Baking Corp., 273 F.Supp. 159 (S.D. N.Y. 1967)	50
Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945)	55
Standard Oil of Kentucky v. Tennessee, 217 U.S. 413 (1910)	9, 39
Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957)	21, 22, 37
Thill Securities Corp. v. New York Stock Exchange, 433 F.2d 264 (7th Cir. 1970)	7, 29, 47
Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953)	46
Travelers Insurance Co. v. Blue Cross of Western Pennsylvania, 298 F.Supp. 1109 (W.D.Pa. 1969)	27
Union Circulation Co. v. Federal Trade Com'n, 241 F.2d 652 (2nd Cir. 1957)	40
United Electrical Radio and Machine Workers v. Miller Metal Products, Inc., 215 F.2d 221 (4th Cir. 1954)	32
United States v. International Boxing Club, 348 U.S. 236 (1955)	46
United States v. Joint Traffic Ass'n., 171 U.S. 505 (1898)	43
United States v. Philadelphia National Bank, 374 U.S. 321 (1963)	43
United States v. Radio Corp. of America, 358 U.S. 334 (1959)	42, 44
United States v. Trans-Missouri Freight Assn., 166 U.S. 290 (1897)	43
Vasquez v. Superior Court, 4 Cal.3d 800, 484 Pac.2d 964 (1971)	34

	Pages
Washington Gas Light Co. v. Virginia Electric & Power Co., 438 F.2d 248 (4th Cir. 1971) .....	27
Waters-Pierce Oil Co. v. Texas, 212 U.S. 86 (1909) .....	39
Weiman v. Superior Court, 51 Cal.2d 710, 336 Pac.2d 489 (1959) .....	35
Wilko v. Swan, 346 U.S. 427 (1953) .....	7, 14, 15, 18
Wine v. Southern Pacific Co., 1 Cal.3d 600, 463 Pac.2d 426 (1970) .....	11

### Codes

California Business & Professions Code Section 16600 .....	4, 6, 9, 20, 35, 38, 55
Code of Civil Procedure, Section 1293 .....	35
Labor Code:	
Section 200 .....	11
Section 229 .... 4, 6, 7, 9, 10, 11, 16, 20, 23, 24, 30, 31, 32, 35, 38	

### Statutes

Labor Management Relations Act of 1947, Section 301(a) .....	37
7 U.S.C. 1, Section 1, et seq. (Commodities Exchange Act) .....	48
9 U.S.C. (Federal Arbitration Act, Act of June 30, 1947, 61 Stat. 670):	
Section 1 et seq. ....	8, 10
Section 1 .....	8, 21, 31, 33
15 U.S.C. (Sherman Act, Act of July 14, 1890, 26 Stat. 289):	
Section 1 et seq. ....	40, 56
Sections 1, 2 .....	40
15 U.S.C. (Securities Act of 1933, Act of May 27, 1933, 48 Stat. 74):	
Section 77 .....	passim
Section 77n (Section 14 of the Act) .....	14, 15, 16, 18
Section 77p (Section 16 of the Act) .....	17
Section 77v (Section 22 of the Act) .....	19

# TABLE OF AUTHORITIES CITED

vii

	Pages
15 U.S.C. (Securities Exchange Act of 1934, Act of June 6, 1934, 48 Stat. 881, et seq., as amended):	
Section 78	passim
Section 78f	2
Section 78f(a)(1) (Section 6(a)(1) of the Act)	2, 7, 13, 16, 18, 35
Section 78f(c)	22, 25, 41
Section 78f(c)(3)	7
Section 78f(d)	12
Section 78i (e)	12
Section 78p(b)	12
Section 78r(a)	12
Section 78s(b)	12
Section 78aa (Section 27 of the Act)	12, 19
Section 78bb (Section 28 of the Act)	3, 8
Section 78bb(a) (Section 28(a) of the Act)	16, 17, 22, 35
Section 78bb(b) (Section 28(b) of the Act)	16, 18
Section 78cc (Section 29 of the Act)	4, 7, 16, 35
Section 78cc(a) (Section 29(a) of the Act)	15, 16, 18
Section 78cc(b) (Section 29(b) of the Act)	20
28 U.S.C. Section 1446(b)	37
29 U.S.C. (Labor Management Relations Act, Act of June 23, 1973, 61 Stat. 156), Section 301	30, 37
49 U.S.C. Section 1384	45
49 U.S.C. (Federal Aviation Act) Section 1506	17

## Texts

Alsen, Arbitration and Antitrust—Are They Compatible?	
44 N.Y.U.L. Rev. 1097 (1969)	9, 35, 49
Blake, Employee Agreements Not To Compete, 73 Harv.L. Rev.:	
Pages 625, 627 (1960)	56
Page 628, n. 8 (1960)	39
Page 688, n. 211 (1960)	51

	Pages
B.N.A. Securities Regulation & Law Report No. 190, B-6, February 21, 1973 .....	9, 30, 47, 49
Loevinger, Antitrust Issues as Subjects of Arbitration, 44 N.Y.U.L. Rev. 1085 (1969) .....	35
1 Loss, Securities Regulation:	
Chapter I (2d Ed., 1969 Supp.) .....	28
Pages 130-131 (2d Ed. 1961) .....	12
Pitofsky, Arbitration and Antitrust Enforcement, 44 N.Y. U.L. Rev. 1072, 1077 (1969) .....	55
Stern, A Proposed Uniform State Antitrust Law: Text and Commentary On a Draft Statute, 39 Texas L. Rev. 717 (1961) .....	39
Pages 718-719 .....	39

### Miscellaneous

New York Stock Exchange Constitution:	
Article VIII .....	7, 13, 14, 25, 35
Article VIII, Section 6 .....	13, 29, 35
Rule 347(b) .....	5, 6, 7, 14, 17, 18, 26, 30, 35
Rules 481-491 .....	29
CCH Pacific Coast Stock Exchange Guide, ¶1806.	
Article VIII Arbitration of Claims, Non-Member Claim	26
CCH Pacific Coast Stock Exchange Guide, ¶5300.	
Rule XII Arbitration of Claims of Non-Members ....	26

# **In the Supreme Court**

OF THE

**United States**

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**OCTOBER TERM, 1972**

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**No. 72-312**

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**MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,**  
*Petitioner,*

**VS.**

**DAVID WARE, et al.,**  
*Respondents.*

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**On Writ of Certiorari to the Court of Appeal of the  
State of California for the First Appellate District**

**RESPONDENTS' BRIEF**

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## **QUESTIONS PRESENTED**

1. Whether the doctrine of federal preemption applies where a state law, permitting citizens of the state access to a judicial forum to settle private wage disputes with their employer, is invoked to negate application of a private arbitration agreement authorized by the rules of the New York Stock Exchange, when the state statute itself comports with similar federal legislation, and constitutes the implementation

of authority to an area over which the states have traditionally exercised jurisdiction.

2. Whether a state antitrust statute, declaring illegal any contract by which a person is restrained from engaging in a lawful occupation, as applied to a restraint of trade provision in a profit sharing plan of a national corporation constitutes an impermissible burden on interstate commerce where the forfeiture provision is not required by federal law or the laws of any other state and the effect of such antitrust law on the profit sharing plan is limited to the confines of the enforcing state.

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### STATUTORY PROVISIONS INVOLVED

United States Code, Title 15:

§78f. Registration of national securities exchanges.

(a) Any exchange may be registered with the Commission as a national securities exchange under the terms and conditions hereinafter provided in this section, by filing a registration statement in such form as the Commission may prescribe, containing the agreements, setting forth the information, and accompanied by the documents, below specified:

(1) An agreement (which shall not be construed as a waiver of any constitutional right or any right to contest the validity of any rule or regulation) to comply, and to enforce, so far as is within its powers, compliance by its members, with the provisions of this chapter, and any

amendment thereto and any rule or regulation made or to be made thereunder;

\* \* \*

(c) Nothing in this chapter shall be construed to prevent any exchange from adopting and enforcing any rule not inconsistent with this chapter and the rules and regulations thereunder and the applicable laws of the State in which it is located.

\* \* \*

§78bb. Effect on existing law.

(a) The rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity; but no person permitted to maintain a suit for damages under the provisions of this chapter shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of. Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder.

(b) Nothing in this chapter shall be construed to modify existing law (1) with regard to the binding effect on any member of any exchange of any action taken by the authorities of such exchange to settle disputes between its members, or (2) with regard to the binding effect of such action on any person who has agreed to be bound thereby, or (3) with regard to the binding effect

on any such member of any disciplinary action taken by the authorities of the exchange as a result of violation of any rule of the exchange, insofar as the action taken is not inconsistent with the provisions of this chapter or the rules and regulations thereunder.

**§78cc. Validity of contracts.**

(a) Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.

**California Business & Professions Code**

**§16600. Contracts void.**

Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade or business of any kind is to that extent void.

**California Labor Code**

**§229. Maintenance of actions despite private agreement to arbitrate: Application of section.**

Actions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate. This section shall not apply to claims involving any dispute concerning the interpretation or application of any collective bargaining agreement containing such an arbitration agreement.

**STATEMENT OF THE CASE**

Respondent David Ware was employed by Merrill Lynch, on July 14, 1958, in San Francisco, California as an account executive. He continued to work for Merrill Lynch in San Francisco until March 17, 1969, when he voluntarily terminated his employment to accept a position with one of petitioner's competitors. (App. 45-46). By reason of accepting a competitive position, respondent forfeited all post-1960 wages credited to Ware's profit sharing fund by reason of Article 11.1 of the profit sharing plan. (App. 45-46; App. 38).

On January 19, 1970, Ware filed a class action suit in the California Superior Court claiming that the forfeiture provision was illegal as applied to California residents. (App. 2-7). Merrill Lynch filed its answer on April 17, 1970 and raised various defenses not one of which charged any respondent with theft of confidential business lists or breach of any fiduciary duty. (App. 45-50).

Petitioner did not request a restraining order of any type, or removal of the action to federal court. Rather it petitioned the state court for an order compelling arbitration by reason of arbitration clauses contained in the RE 1 Form and Rule 347(b) of the New York Stock Exchange Constitution. (App. 51-56).

The court denied the petition without comment and concomitantly therewith granted Ware's motion to allow the suit to proceed as a class action. (App. 57). Under California law, where the facts are not in dis-

pute, findings of fact and conclusions of law are not required. (App. 61).

A timely appeal was taken by Merrill Lynch wherein it asserted, inter alia, that the RE 1 Form was a valid contract; that no grounds existed under California law for the revocation of the arbitration agreement; that said agreement was not adhesive; and that the profit sharing plan's forfeiture provision, the underlying subject of any arbitration, was not illegal under state law. (1 R. Exh. A).

The California Court of Appeal affirmed,<sup>1</sup> holding that the forfeiture provision was illegal as applied to California residents pursuant to California Business & Professions Code §16600, and that Ware could not be compelled to arbitrate his claim by reason of California Labor Code §229 which preserves the right of employees to settle individual wage claims before the courts, notwithstanding private arbitration agreements to the contrary. (App. 57-68).

The California Supreme Court denied Merrill Lynch's petition for hearing without opinion. (2 R. Exh. I).

### SUMMARY OF ARGUMENT

1. The Merrill Lynch forfeiture provision and the New York Stock Exchange Rule, 347(b) (even as construed by petitioner as requiring compulsory arbi-

<sup>1</sup>This same court had previously held the forfeiture provision illegal in *Frame v. Merrill Lynch, Pierce, Fenner & Smith*, 20 Cal.App.3d 668, 97 Cal.Rptr. 811 (1971). Petitioner did not seek appellate review of that decision. (App. 69-74).

tration of wage disputes) are not mandated or even favored by federal policy:

(a) The language of 15 U.S.C. 78f(3)(c) commands that Exchange rules must comply with appropriate state legislation such as California Labor Code §229 as well as the directives contained in the Securities Exchange Act itself.

(b) Rule 347(b) constitutes an impermissible attempt by the Exchange to deprive respondents of their constitutional right to a trial by jury in violation of 15 U.S.C. §78f(a)(1), and Article VIII, of the Exchange constitution.

(c) The Exchange arbitration contract, Form RE-1, is a stipulation within the meaning of 15 U.S.C. §78cc, and is void by reason thereof. *Wilko v. Swan*, 346 U.S. 427 (1953); *Reader v. Hirsch & Co.*, 197 F.Supp. 111 (S.D. N.Y. 1961).

(d) The regulation of employer-employee wage dispute does not go to the heart of federal securities regulation. The conflicts presented in cases such as *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963) and *Thill Securities Corp. v. New York Stock Exchange*, 433 F.2d 264 (7th Cir. 1970), were much more directly within "... the general dimensions of the duty of self-regulation ... suggested by §19(b) of the Act, 15 U.S.C. §78s(b) ... " *Silver* at p. 352.

(e) The Securities and Exchange Commission does not have the authority to review or modify Rule 347(b). *Silver*, at pp. 372-373. Accordingly, it cannot be presumed that this rule has received acceptance either by the Commission or by Congress.

2. The legislative history of the Act of 1934, as well as specific provisions contained in the Act, such as 15 U.S.C. §78bb, indicate a Congressional intent that the states should exercise concurrent jurisdiction with the federal government over Exchange member activities not involving investor protection. Moreover, it is not a corollary of the existence of federal regulations in a field of commerce that a state's coexistent regulatory power is preempted. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963).

(a) The federal courts are not disposed to attribute to Congress an intent to displace state laws which promote significant local policies. *Parker v. Brown*, 317 U.S. 341 (1943).

3. The California Legislation precluding compulsory arbitration of wage disputes in a non-collective bargaining context is consistent with the exclusionary provisions of 9 U.S.C. §1 (the Federal Arbitration Act). *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403 n.9 (1967) and 388 U.S. at p. 414 (dissenting opinion of Justice Black).

(a) The matter of employer-employee wage disputes is primarily one of local concern over which state courts have been given exclusive control. *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation*, 348 U.S. 437 (1954).

(b) Individual arbitration hearings would provide an ineffective remedy in the present situation, given the class action aspects of the litigation and would defeat the implementation of the impor-

tant state policies reflected in *California Labor Code* Section 229 and *Business and Professions Code* 16600.

(c) The underlying subject of arbitration would be the issue of illegality of the Merrill Lynch forfeiture provision. Questions of illegality are not subject to arbitration. *Kelly v. Kosuga*, 358 U.S. 516 (1959).

4. The implementation of state antitrust policies such as Section 16600 is not prohibited by the existence of similar federal legislation. *Standard Oil of Kentucky v. Tennessee*, 217 U.S. 413 (1910).

(a) Neither the New York Stock Exchange nor its members have received Congressional immunization from antitrust sanctions, *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963); *Ricci v. Chicago Mercantile Exchange*, — U.S. —, 93 S.Ct. 573 (1973); *B.N.A. Securities Regulation and Law Report No. 190*, E.1-E.6, February 21, 1973.

(b) Important state policies, particularly in the field of antitrust, cannot be blunted through the arbitration process. *Aksen, Arbitration and Antitrust —Are They Compatible?* 44 N.Y.U.L. Rev. 1097 (1969), and the cases cited therein.

5. No state or federal law requires the forfeiture provision contained in Article 11.1 of the Merrill Lynch Profit Sharing Plan. Hence, Section 16600 does not interfere with or burden the interstate application of the profit sharing plan. In any event, the plan has been voluntarily discontinued by petitioner

as of October 1972, thereby obviating the need for this Court to pass on its uniformity argument.

(a) An impermissible burden on interstate commerce is not created by the mere fact that Merrill Lynch is subject to varying laws of different states. *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424, 428 (1963).

## ARGUMENT

### I

**CALIFORNIA LABOR CODE §229 PRECLUDING COMPULSORY ARBITRATION OF INDIVIDUAL WAGE DISPUTES IS CONSISTENT WITH FEDERAL LAW; IN NO WAY INTERFERES WITH FEDERAL RULES AND POLICIES RELATING TO THE REGULATION OF SECURITIES; AND NEITHER FEDERAL LAW NOR THE RULES OF THE NEW YORK STOCK EXCHANGE OPERATE TO PREEMPT SUCH STATE LEGISLATION.**

A. The application of California Labor Code §229 to the present controversy is compatible with federal securities legislation and is not preempted by such laws.

The State of California, like the federal government, recognizes that arbitration generally provides an efficacious means of resolving private commercial disagreements. However, both the California legislature, through Labor Code §229, and Congress in the Federal Arbitration Act, 9 U.S.C. §1 et seq., acknowledged that arbitration was an inappropriate vehicle to determine individual wage claims in situations where, by reason of their superior economic and negotiating strength, employers compel prospective employees not represented by collective bargaining

units, to sacrifice the privilege to settle future disputes through the judicial process in order to secure employment.

Moreover, the right of a wage earner to all lawfully due compensation is a matter of significant public concern, *City of Ukiah v. Fones*, 64 Cal.2d 104, 410 Pac.2d 369 (1966), which demands the protection of our impartial and independent judicial system with its attendant due process safeguards, as opposed to an employer-organized and controlled arbitration board such as that of the New York Stock Exchange, to which petitioner would have the present litigation referred.

The argument is made that this California legislation may not stand in the way of a New York Stock Exchange rule which would compel Merrill Lynch employees to arbitrate wage claims before an Exchange arbitration panel.<sup>2</sup> Petitioner suggests that Labor Code §229 is inconsistent with federal legislation governing the securities industry, but concedes, as it must, however, that the Securities Exchange Act does not mention arbitration, let alone command such a procedure as the means of settling disputes (Pet. Brief p. 22), and that the Act of 1934 was not intended to, and does not, preempt state legislation dealing with the regulation of securities dealers and registration of securities. (Pet. Brief pp. 19-20).

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<sup>2</sup> Respondents' interest in the profit sharing plan clearly falls within the definition of "wages" under California law. See Calif. Labor Code §200; *Wise v. Southern Pacific Co.*, 1 Cal.3d 600, 607, 463 Pac.2d 426 (1970). Petitioner concedes that this interpretation is binding for purposes of the present dispute. (Pet. Brief p. 14).

The New York Stock Exchange rules compelling arbitration are not imprinted, ipso facto, with the seal of federal law. An exchange rule may be challenged and judicially invalidated as being beyond "... the great purposes of the Securities Exchange Act" especially when it deprives an individual of one of his most important constitutional rights. In such a case, the self-regulatory activity is "unjustified." *Silver v. N. Y. Stock Exchange*, 373 U.S. 341, 359 (1963).

The Securities Exchange Act was not designed to regulate wage disputes between an employer and employee. Rather, its purpose is "... to insure fair dealing and to protect investors ..." 15 U.S.C. §78f(d) or, as one observer states: "To afford a measure of disclosure to people who buy and sell securities; to prevent and afford remedies for fraud in securities trading and manipulation of the markets; to regulate the securities markets; and to control the amount of the Nation's credit which goes into those markets." 1 *Loss, Securities Regulation*, 130-131 (2d Ed. 1961).

Congress has charged the courts with the responsibility of insuring compliance with its directives under the Act of 1934, not the Securities and Exchange Commission or the New York Stock Exchange. See for example, 15 U.S.C. §78aa, 15 U.S.C. §78i(e), 15 U.S.C. §78p(b) and 15 U.S.C. §78r(a). The Commission itself is not vested with jurisdiction to review or alter Exchange rules governing arbitration. *Silver*, at pp. 372 and 373; 15 U.S.C. §78s(b). It follows therefore that the imprimatur of Congress has not been

stamped on the arbitration policies of the New York Stock Exchange.

The New York Stock Exchange and Merrill Lynch would disregard in its entirety the command of Congress under the 1934 Act that no agreement shall be considered "... as a waiver of any constitutional right or any right to contest the validity of any rule or regulation." 15 U.S.C. §78f(a)(1).

This imperative as yet remains unconstrued by the courts. Not one case cited by Merrill Lynch has considered the application of this savings clause. Its mandate is clear. It has been observed in token fashion by the New York Stock Exchange in Article VIII of the Constitution preserving the right of all non-members of the Exchange to settle any controversy with petitioner in a courtroom rather than at an arbitration table unless the employees specifically elect otherwise.<sup>3</sup>

In ordering to arbitration a dispute between a non-member and an Exchange member at the election of the non-member, the Federal District Court in *Axelrod & Co. v. Kordich, Victor & Neufeld*, 320 F. Supp. 193 (S.D. N.Y. 1970), Aff'd 451 F.2d 838 (2d Cir. 1971), specifically held that a *member*, by reason

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<sup>3</sup>Merrill Lynch concedes respondents are non-members but asserts their classification is unimportant. (Pet. Brief p. 17).

Article VIII §6. "Any controversy between a non-member and a member or allied member or member firm or member corporation, arising out of the business of such member, allied member, member firm or member corporation or the dissolution of a member firm or a member corporation shall, at the instance of such non-member, be submitted for arbitration as provided hereinbelow."

of Article VIII of the New York Stock Exchange Constitution, could not compel a *non-member* to arbitrate. The Court, in *Azelrod*, was of the opinion the position of a party as a non-member was significant.

The New York Stock Exchange Constitution, like a state or federal constitution, would supersede and control those situations involving a conflict between a constitutional provision and a by-law or rule, such as Rule 347(b). Merrill Lynch cannot, therefore, compel its former non-member employees to arbitration against their will.

The waiver provisions contained in Rule 347(b) require arbitration of all disputes *in praesenti* or *in futuro*. No one can become a registered representative of the New York Stock Exchange without stipulating to waive, as a condition precedent of employment, the right to a judicial forum. (Pet. Brief pp. 11-12). *Rust v. Drexel Firestone, Inc.*, 352 F.Supp. 715 (S.D. N.Y. 1972).

The existence of written agreements to arbitrate future disputes between a customer and a member firm or between individuals dealing in securities has never given this Court difficulty. In *Wilko v. Swan*, 346 U.S. 427 (1953), an executory agreement to arbitrate between an investor and a broker was condemned as an unlawful waiver of the right to sue in court contrary to Section 14 of the Securities Act of 1933, 15 U.S.C. §77n. In so ruling, the Court held such an arbitration agreement was a stipulation within the meaning of §77n and, further, that executory agreements to arbitrate are treated with dis-

favor. To the same effect, *Shapiro v. Jaslow*, 320 F.Supp. 598 (S.D. N.Y. 1970); *Maheu v. Reynolds & Co.*, 282 F.Supp. 423 (S.D. N.Y. 1967); *Pawgan v. Silverstein*, 265 F.Supp. 878 (S.D. N.Y. 1967); *Reader v. Hirsch & Co.*, 197 F.Supp. 111 (S.D. N.Y. 1961).

In an effort to avoid this Court's criticism of such executory agreements, Merrill Lynch argues that when Ware signed the RE 1 Form in 1958 at the start of his employment, he agreed to arbitrate the present controversy which arose when he left in 1969. (Pet. Brief, pp. 33-34). Article 11.1 of the Profit Sharing Plan only forfeits those wages credited to the employee's account subsequent to the fiscal year ended December, 1960. (App. 38). This is so because the plan was amended in 1960 to include the forfeiture provision. Accordingly, the adhesive application signed by Ware in 1958 was executory in nature since no dispute existed at the time of his employment as to post-1960 earnings, and would be unenforceable by that fact alone. *Coenen v. R. W. Pressprich & Co.*, 453 F.2d 1209, 1215 (2nd Cir.), cert. denied, 406 U.S. 949 (1972).

The Court, in *Wilko*, limited its holding to a securities buyer-broker situation solely by reason of the express language contained in §77n, that any stipulation requiring "a person acquiring any securities" to waive in advance his right to select a judicial forum, is void and unenforceable.

Such a limitation was eliminated from the Securities Exchange Act of 1934, 15 U.S.C. §78cc(a) which

is the equivalent of §77n. Section 29 of the 1934 Act voids any stipulation "binding any person" to waive the right to a judicial hearing. It follows that Congress sought to redefine the perimeters of the Act's effectiveness to include within its protective boundaries employees and any other class of persons who deal with the Exchange and its members on unequal terms.

When faced with a similar statutory construction problem under the Federal Employers Liability Act, this Court chose to interpret such legislation in a manner that would protect the rights of individual employees against their more powerful employers. *Philadelphia, Baltimore & Washington R.R. Co. v. Schubert*, 224 U.S. 603, 611 (1912).

There is no logical reason why a non-member employee should be treated any differently from an investor since both are at similar disadvantage when faced with the superior economic power of the New York Stock Exchange and its members.

Within this context, California Labor Code §229 parallels the Congressional intent manifested in §77n of the Securities Exchange Act of 1933 and Sections 78f(a)(1), 78bb(a)(b) and 78cc(a) of the Securities Exchange Act of 1934, that the constitutional right of individuals to settle their grievances in a court of law will be respected and protected against infringement.

Congress, in enacting the Securities Acts of 1933 and 1934 created special federal rights which are sup-

plementary to "any and all other rights and remedies that may exist in law or at equity;". Section 28(a) of the Act of 1934, and Section 16 of the Act of 1933.<sup>4</sup> Cf. 49 U.S.C. §1506, of the Federal Aviation Act. Before such federal legislation came into existence, the judicial remedies allowed a suitor were those created exclusively by state law which law continues to control as to violations outside the defined purposes of the 1934 Act. *Colonial Realty Corp. v. Bache & Co.*, 358 F.2d 178, 182-183 (2nd Cir. 1966) cert. denied, 385 U.S. 817 (1966).

The federal cases relied upon by petitioner do not support its Rule 347(b) argument.<sup>5</sup> Rather, these decisions, under the questionable leadership of *Brown*, regrettably indicate a tendency on behalf of the lower federal courts to abdicate the judicial responsibilities placed upon them by the Constitution and by Con-

<sup>4</sup>15 U.S.C. §77p. "The rights and remedies provided by this subchapter shall be in addition to any and all other rights and remedies that may exist at law or in equity."

<sup>5</sup>*Brown v. Gilligan, Will & Co.*, 287 F.Supp. 766 (S.D. N.Y. 1968), [arbitration required in member v. member situation]; *Coenen v. R. W. Pressprich & Co.*, 453 F.2d 1209 (2nd Cir. 1972), cert. denied 406 U.S. 949 (1972) [arbitration required in action by an allied member against a member firm]; *Axelrod & Co. v. Kordich, Victor & Neufeld*, 451 F.2d 838 (2nd Cir. 1971) [defendant non-member can voluntarily submit to arbitration and compel arbitration over objections of plaintiff-member firm]; *Revenue Properties Litigation Cases v. Cohn, Delaire & Kaufman*, 451 F.2d 310 (1st Cir. 1971) [both parties were broker-dealer members and arbitration was granted]; *Isaacson v. Hayden, Stone, Inc.*, 319 F. Supp. 929 (S.D. N.Y. 1970) [arbitration in member v. member dispute]; *Dickstein v. duPont*, 320 F.Supp. 150 (D.Mass. 1970), aff'd 443 F.2d 783 (1st Cir. 1971) [employee v. member]; *Rust v. Drexel Firestone, Inc.*, 352 F.Supp. 715 (S.D. N.Y. 1972) [employee v. member]; *Ayres v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, CCH Fed. Sec.L.Rep. ¶93742, E.D. Pa. January 19, 1973) [allied member-member].

gress under the Securities Exchange Acts of 1933 and 1934, and a patent refusal to enforce the rulings of this Court, in *Wilko* and *Silver*, insofar as they apply to investor or non-member claims.

The *Brown* case involved the question of arbitrability of a dispute between two member firms of the American Stock Exchange (AMEX). The Rules of AMEX, like the rules of the New York Stock Exchange, require arbitration between members, but do not contain any waiver provision similar to Rule 347(b) which would require arbitration of non-member claims.

The Court, in *Brown*, without legal precedent, held that Section 28(b) of the 1934 Act, 15 U.S.C. §78bb(b) operated to preempt, as it were, the non-waiver provisions of Section 29(a), 15 U.S.C. §78cc(a), as well as Section 14 of the 1933 Act, 15 U.S.C. §77n, thereby overruling in essence *Wilko v. Swan*, *supra*.

There is absolutely no support for this position in the Congressional history of the 1934 Act. Such a ruling flies in the face of Supreme Court precedent as well as the clear wording of Section 28(b) that "nothing in this chapter shall be construed to modify existing law . . ." and that any action taken by the Exchange must be consistent with all other provisions of the 1934 Act.

Section 28(b) was not meant to apply in those situations which are violative of Section 29(a), 15 U.S.C. §78cc and Section 6(a)(1), 15 U.S.C. §78f(a)(1).

Further, such a construction directly conflicts with the grant of judicial jurisdiction contained in Section 27, 15 U.S.C. §78aa and Section 22 of the 1933 Act, 15 U.S.C. §77v.

Cases such as *Coenen, Revenue Properties Litigation Cases, Brown, Isaacson and Ayres* all involved member disputes which, as recognized in *Azelrod*, are treated differently from employee situations under Section VIII of the Exchange Constitution. With the exception of *Rust v. Drexel Firestone, Inc.*, 352 F.Supp. 715 (S.D. N.Y. 1972), not one case considered the interaction of state law.

In *Rust*, an employee-employer dispute, the District Court compelled arbitration against the defense of duress on the grounds that plaintiff had failed to establish duress and, further, that the New York Stock Exchange requirement of compulsory arbitration did not conflict with the legislative policy of the State of New York, Rust's domicile. In *Ware*, California has deemed it important to its local public policy to protect its citizens from such compulsory arbitration.

Certainly, a sovereign state's interest in the welfare of its citizens is more pervasive than that of the New York Stock Exchange. In addition, the Court, in *Rust*, mistakenly relied on *Dickstein* as holding that the Securities Exchange Act immunizes the RE 1 Form arbitration clause from antitrust attack. On the contrary, the Court in both *Dickstein* and *Coenen* recognized that if more than perfunctory antitrust

claims had been pleaded, neither dispute would be subject to arbitration.

The construction placed upon the meaning of Section 29(b) by *Brown* and its progeny represents a marked departure from such cases as *Boyd v. Grand Trunk Western R.R. Co.*, 338 U.S. 263 (1949); *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945); *Duncan v. Thompson Trustee*, 315 U.S. 1 (1942); and *Philadelphia, Baltimore & Washington R. R. Co. v. Schubert*, 224 U.S. 603 (1912), wherein this Court struck down under other federal statutes agreements that would limit an individual's choice of forum, or constitute a waiver of his right to bring a lawsuit.

This Court, however, need not choose between enforcement of the California legislation challenged and the policies of the Securities Act, for the application of the relevant California statutes in the present context is in no way inconsistent with federal securities regulation, and not preempted thereby.

The important state interests promoted by §229, especially in combination with California Business and Professions Code §16600, the other statute challenged by petitioner, are to protect employees in their right to work and to pursue lawful trades and professions irrespective of employer attempts to impose restrictions on their job mobility (§16600); and to preserve the right of individual employees to utilize judicial remedies to collect due and unpaid wages irrespective of employer attempts to compel arbitration of wage claims.

In advancing its preemption argument, petitioner relies on *Perez v. Campbell*, 402 U.S. 637 (1971) and *Hines v. Davidowitz*, 312 U.S. 52 (1941). Neither of these cases is even remotely connected to the problem of reconciling federal securities policy with state legislation. In fact, not one single case has been cited in which a state statute has been held preempted by federal securities legislation.

In *Perez*, this Court invalidated an Arizona "financial responsibility" law because it was inconsistent with the Federal Bankruptcy Act. The Arizona statute provided that a discharge in bankruptcy would not relieve the debtor of the state's statutory requirements. In effect, Arizona law directly conflicted with federal bankruptcy policy in favor of giving debtors "... 'a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.'" 402 U.S. 637, at 648.

In *Ware*, the California statute precluding compulsory arbitration of employer-employee wage disputes does not jeopardize any federal securities policy. Indeed, Congress has adopted a similar exclusionary provision for disputes concerning employees who are engaged in interstate commerce. 9 U.S.C. §1. There is no indication whatsoever that Congress intended to exempt the securities industry from this general provision. To paraphrase Justice Frankfurter in his dissenting opinion in *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), nothing pertaining to the 1934 Act suggests vesting the New York Stock Exchange

with sweeping power under the commerce clause or the Securities Act comparable to that vested in the federal courts under the bankruptcy power. *Id.* at 484.

In *Perez*, this Court's preemption decision was based, in part, on the necessity of uniform federal regulation in the field of bankruptcy. 402 U.S. at pp. 655-656. In contrast, there is no similar interest in uniformity in our present case. Moreover, with respect to industry self-regulation, federal law requires stock exchange rules must be consistent with appropriate state laws. 15 U.S.C. §§78f(c), 78bb(a).

For these same reasons, reliance on *Hines v. Davidowitz, supra*, is likewise misplaced. In that case, a state law regarding aliens was held invalid because of its interference with federal regulations. Unlike the present situation, the control of aliens was found to be a matter of predominant federal concern. The state's interest was minimal at best.

A closer analogy to *Ware* may be found in *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963) where federal legislation sought to ensure the maturity of avocados reaching retail markets. The federal standards were promulgated, in part, by an industry governing body. 373 U.S. at p. 138. Thus, as in our case, there existed general federal regulations and more specific industry self-regulatory rules adopted under the supervision of the federal government. The Florida growers complied with these federally-related standards and with the rules adopted by the industry but not with the more restrictive California state requirements. In its decision, this Court held that the more stringent California regu-

lations were *not* preempted by either federal regulations or the industry rules. As Mr. Justice Brennan stated [373 U.S. at p. 142]:

"... federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained. See, e.g., *Huron Portland Cement Co. v. Detroit*, *supra*." [362 U.S. 440].

In *Ware*, as in *Florida Growers*, Congress established minimum standards of fair dealing for the industry. Congress expressly authorized continuing state regulation. Mr. Justice Brennan observed, "The maturity of avocados seems to be an inherently unlikely candidate for exclusive federal regulation. Certainly it is not a subject by its very nature admitting only of national supervision. Cf. *Cooley v. Board of Port Wardens*, 12 How. 299 . . ." 373 U.S. at pp. 143-144.

This is equally true of problems regarding employer-employee wage disputes, an even more local interest which is within the state's power to regulate as California has through Labor Code §229. Wage disputes, even in the securities industry, are not subjects demanding exclusive federal regulation. There has been no showing that national uniformity in the area of wage claims is vital to federal securities policy or to the national interest. Compare *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) and *Florida Growers, supra*, 373 U.S. at p. 144.

The dissenting opinion by Mr. Justice White in the *Florida Growers* case was based on the view that the federal government, not a private corporation, had attempted to define a national and uniform standard of maturity of avocados in order to facilitate marketing in interstate commerce, and that the California statute interfered with this necessary interstate standard of uniformity. 373 U.S. at pp. 165-166. The dissenters found that the conflict between federal and state law was "unmistakable." 373 U.S. at p. 173.

By contrast, no such conflict is even remotely definable herein. The California statute precluding compulsory arbitration of wage disputes does not interfere with or even relate to federal policy concerning protection of investors. Clearly, state law has not "... erected a substantial barrier to the accomplishment of Congressional objectives," *Florida Growers*, 373 U.S. at p. 167 (dissenting opinion).

In short, there is no evidence in federal securities laws or their legislative history which would indicate that Congress intended to supplant state regulation. On the other hand, there is every indication that Congress anticipated and intended for a broad range of state laws including those such as California's Labor Code §229 to govern private businesses within the securities industry. Under these circumstances, a finding of preemption cannot be made. *Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.*, 372 U.S. 714 (1963); *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424 (1963).

Sovereign states have the prerogative to establish legislative policies protecting employees' rights as against economically more powerful employers. *Lincoln Federal Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949); *Day-Brite Lighting, Inc., Compco Corp., v. Missouri*, 342 U.S. 421 (1952); *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pacific Railroad Co.*, 393 U.S. 129 (1968).

The Securities Exchange Act, itself, recognizes that the policy permitting limited self-regulation is subject to restriction. In 15 U.S.C. §78f(c), Congress has allowed a stock exchange to adopt and enforce its own rules so long as such rules are "... not inconsistent with ... the applicable laws of the state in which it is located."

Stock exchange rules must correspond to all appropriate federal and state legislative policies. Members of the New York Stock Exchange (and the Exchange itself, through its member firms) are clearly "located" in the State of California. The Exchange and its member firms engage in vast amounts of business on a regular basis in California. Merrill Lynch has twenty-three offices in California and is a member of the Pacific Coast Stock Exchange whose principal office is physically located in San Francisco, California.

The arbitration rules of the Pacific Coast Stock Exchange, like Article VIII of the New York Stock Exchange Constitution, provide that non-member employees cannot be compelled to arbitrate unless they

themselves make such an election. No waiver provisions similar to Rule 347(b) are in effect.<sup>a</sup>

Since Merrill Lynch is a member not only of the New York Stock Exchange but also of the American Stock Exchange, Pacific Coast Stock Exchange and other exchanges located in various states, its uniformity thesis becomes immediately discredited. To use petitioner's own argument, it must comply with the laws of the state in which the exchange is located. Hence, it must obey California law as well as the law of the other states in which it holds exchange membership.

In the case of *Parker v. Brown*, 317 U.S. 341 (1943), a state directed that producers of raisins combine to restrict the supply of raisins being shipped to interstate markets. The action of the raisin producers would have been a clear violation of federal antitrust laws if carried out solely by private individuals (317 U.S. at p. 350). Moreover, there was no indication in the Sherman Act or any other federal statute that the states were authorized to pass regulations inconsistent with the national policy of free and open competition.

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<sup>a</sup>*Article VIII Arbitration of Claims, Non-Member Claim*

Sec. 2. Any other claim by a member or non-member against a member or member firm may be submitted to arbitration pursuant to the Rules of the Exchange by agreement of the parties.

*CCH Pacific Coast Stock Exchange Guide*, ¶1806.

*Rule XII Arbitration of Claims of Non-Members*

Sec. 1. Any person not a member of the Exchange shall have the right to make a demand against a member of the Exchange arising from any Exchange transactions upon the following conditions.

*CCH Pacific Coast Stock Exchange Guide*, ¶5300.

Despite these considerations, this Court ruled that the power of the state to enact legislation to protect the welfare of its citizens and to preserve its local industry (317 U.S. at p. 346) was beyond the reach of federal antitrust legislation. In *Parker*, the state raisin proration program

"... derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 317 U.S. at pages 350-1 (Emphasis added).

The emphasis in *Parker* on the presumed intent of Congress not to supplant state laws promoting important local policies has been consistently followed. See *Allstate Insurance Co. v. Lanier*, 361 F.2d 870 (4th Cir. 1966); *E. W. Wiggins Airways, Inc. v. Massachusetts Port Authority*, 362 F.2d 52 (1st Cir. 1966); *Washington Gas Light Co. v. Virginia Electric & Power Co.*, 438 F.2d 248 (4th Cir. 1971).<sup>7</sup>

<sup>7</sup>Another line of cases such as *George R. Whitten, Jr., Inc., v. Paddock Pool Builders, Inc.*, 424 F.2d 25 (1st Cir. 1970) and *Travelers Insurance Co. v. Blue Cross of Western Pennsylvania*, 298 F.Supp. 1109 (W.D.Pa. 1969) uphold application of federal antitrust statutes on the ground that the state action there involved was not intended to displace the federal policy favoring free and open competition.

If this Court would presume an intent on the part of Congress not to preempt state laws—even when such state laws seem to conflict with a national interest as significant as the policy favoring competition<sup>\*</sup>—then state laws protecting employees of brokerage houses and stock exchanges must be respected. Moreover, there are numerous state laws which more directly regulate and affect the securities business (as to issuing stock, licensing brokers, etc.) than the mere regulation of employer-employee relationships involved in the present case. See *I Loss, Securities Regulation*, Chapt. I (2d Ed., 1969 Supp.).

In its landmark and frequently re-affirmed decision in *Silver*, this Court refused to find that federal securities legislation displaced other types of statutory regulation of stock exchanges or their members.

"The Securities Exchange Act contains no express exemption from the antitrust laws or, for that matter, from any other statute."

373 U.S. at p. 357.

The Court went on to rule, with particular reference to the applicability of antitrust regulations to the securities industry that repeal of otherwise valid legislation "... is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary." Using this same approach in *Ware*, it becomes readily apparent that neither the wage forfeiture provision in

<sup>\*</sup>In *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 4 (1958) this Court recognized that federal antitrust laws were designed to promote free and open competition as a means of advancing fundamental "economic liberty."

Merrill Lynch's profit sharing plan nor the compulsory arbitration rule (as applied to wage disputes) of the New York Stock Exchange are "... necessary to make the Securities Exchange Act work." *Silver, supra*, 373 U.S. at pp. 357-360. Thus, these private rules cannot be held to repeal or avoid valid state Legislative policies.

The employer-employee dispute here is even further removed and less significant, from the perspective of federal securities policy, than the cut-off of wire connections in *Silver* or the rate discrimination in *Thill Securities Corp. v. New York Stock Exchange*, 433 F. 2d 264 (7th Cir. 1970). Indeed, *Ware* is really outside the "general dimensions of self-regulation suggested by §19 of the Act, 15 U.S.C. §78s(b) ..." *Silver*, 373 U.S. at p. 352.

Employees, like investors, are not sufficiently protected by the arbitration procedures before the exchange.\*

"By providing no agency check on exchange behavior in particular cases, Congress left the regulatory scheme subject to 'the influences of ... [improper collective action] over which the Commission has no authority but which if proven to exist can only hinder the Commission in the tasks with which it is confronted,' " *Silver v. New York Stock Exchange*, 373 U.S. at pp. 358, 359 (1963).

In fact, this Court recognized in *Silver* the complete absence of due process safeguards in the Exchange's

\*There is no right to discovery. The arbitrators are selected from panels of the Exchange or members of the Board of Arbitration selected by the Exchange and the decision of the majority of arbitrators is final. Art. VIII §6, Rules of the Exchange 481-491.

dealings with non-members, *id* at 363. Implicit in that opinion was a rejection of any suggestion that the arbitration process provided in Rule 347(b) met due process requirements, *id.* at 354.

The recent Senate Sub-committee eighteen-month investigation into the securities industry confirms that the New York Stock Exchange has done nothing to comply with the *Silver* mandate. "With respect to proceedings involving non-members, the principal exchanges, in the ten years since the Supreme Court's decision in the *Silver* case, have failed to provide non-members against whom they take actions, with the procedural safeguards which the Court in that case found essential. The Exchange Act should therefore be amended to require all self-regulatory organizations to adopt procedures which will afford constitutionally adequate due process to non-members directly affected by their actions." B.N.A. *Securities Regulation and Law Report* No. 190, E-4, February 21, 1973.

**B. California Labor Code §220 is consonant with federal law.**

The opinion of the California Court of Appeals in *Ware* represents application of the traditional state remedy afforded an employee in a wage dispute with his employer, in keeping with *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation*, 348 U.S. 437 (1954), where this Court rejected an employee's group claim for unpaid wages under §301 of the Labor Management Relations Act by holding that the federal courts lack jurisdiction over such a suit. "The employees have always been

able to enforce their rights in the state courts" (Footnote omitted, *id* at p. 460).

If Congress, as was recognized in *Westinghouse* did not confer federal jurisdiction over employee wage claims by specific legislation in the labor field, then Merrill Lynch's unsupported argument that it was the intent of Congress to confer federal jurisdiction over such disputes by the enactment of the Securities Exchange Act of 1934, becomes all the more incredulous.

The state court's decision in *Ware* finds more than coincidental and parallel support in federal arbitration law. For example, 9 U.S.C. §1 of the Federal Arbitration Act contains similar exclusionary language to Labor Code §229: "... but nothing herein contained shall apply to contracts of employment of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce." (Emphasis added). The Act was designed to exclude from within its framework, "... categories of contracts otherwise within the Arbitration Act but in which one of the parties characteristically has little bargaining power ..." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403, n.9 (1967), such as the respondents' situation in this case. In order to work in the securities business, an applicant must sign the RE-1 form or look for a job in a different industry. *Ayres v. Merrill Lynch*, OCH Fed. Sec. Law Rep. 193742 (E.D., Pa. 1973).

In his dissenting opinion, in *Prima Paint*, Justice Black spelled out the legislative intent behind §1 of the Federal Arbitration Act. "Senator Walsh cited

insurance, employment, construction, and shipping contracts as routinely containing arbitration clauses and being offered on a take-it-or-leave-it basis to captive customers and employees. He noted that such contracts "are really not voluntarily [sic] things at all 'because' there is nothing for a man to do except sign it; and then he surrenders his right to have his case tried by court . . ." He was emphatically assured by the supporters of the bill that it was not their intention to cover such cases." *Id.* at p. 414. (Footnotes omitted). See also *United Electrical Radio and Machine Workers v. Miller Metal Products, Inc.*, 215 F.2d 221 (4th Cir. 1954).

Labor Code §229, like the exclusionary provisions of 9 U.S.C. §1, was enacted to prevent superior, commercial and industrial interests from taking advantage of individual employees who do not have bargaining rights comparable to labor unions which are exempted from the operation of §229. Without judicial intervention and legislative immunization, individual employees could be compelled to arbitrate disputes, in some instances, many thousands of miles away from their homes, and under less than neutral conditions. *Player v. Geo. M. Brewster & Son, Inc.*, 18 Cal. App. 3d 526, 96 Cal.Rptr. 149 (1971). Such arbitration agreements could amount to a denial of due process of law. *Prima Paint, supra*, at p. 407. (Dissenting opinion of Justice Black).

The right of respondents to a judicial determination of their claim for rightfully due compensation, not-

withstanding the existence of an alleged agreement to arbitrate, was decided by the California Court pursuant to the command of controlling state law, notwithstanding the New York choice of law provision in the profit sharing plan. All of the significant contacts between employer Merrill Lynch and the respondent employees occurred in California. Merrill Lynch maintains and operates twenty-three offices in California where respondents were employed and performed their duties. "... no state is bound to recognize or enforce contracts which the government of such state may deem injurious to its own interests, or to the welfare of its own people, or which are in violation of its own laws." *Davis v. Jointless Fire Brick Co.*, 300 Fed. 1, at p. 4 (9th Cir. 1924); *Buskuhl v. Family Life Ins. Co.*, 271 Cal.App.2d 514, 521, 76 Cal. Rptr. 602 (1969).

The decision to apply California law lies within the exclusive jurisdiction of the state courts. *Allen v. Alleghany Co.*, 196 U.S. 458 (1905).

Contrary to suggestions in petitioner's brief, respondents do not seek to undermine the use of arbitration as a means of resolving legal disputes.

It is inconceivable that Merrill Lynch can suggest that the arbitration process will result in economy of time and money where 100 or more members of the class would be relegated to as many separate and individual arbitration hearings. Without a class action vehicle, petitioner can effectively avoid a major state policy and the rights of each individual, as it would

be impractical for each respondent to pursue a separate action using the likely ineffective remedy of arbitration.

" 'Modern society seems increasingly to expose men to . . . group injuries for which individually they are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive. If each is left to assert his rights alone if and when he can, there will at best be a random and fragmentary enforcement, if there is any at all. This result is not only unfortunate in the particular case, but it will operate seriously to impair the deterrent effect of the sanctions which underlie much contemporary law.' Kalvan and Rosenfield, *Function of Class Suit*, 8 U. Chi. L. Rev. 684, 686 (1941);"

*Vasquez v. Superior Court*, 4 Cal.3d 800, 807, 484 Pac. 2d 964 (1971).

Merrill Lynch recognizes as did this Court in *Bernhardt v. Polygraphic Co. of America, Inc.*, 350 U.S. 198 (1956) that arbitration is "outcome determinative".

"The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference in ultimate result." *Bernhardt* at p. 203.

Merrill Lynch purposefully acquiesced in the ruling of the California courts in *Frame v. Merrill Lynch*, 20 Cal.App.3d 668, 97 Cal. Rptr. 811 (1971), invalidating the forfeiture provision in Article 11.1 of its profit

sharing plan.<sup>10</sup> No petition for review was filed with either this Court or the California Supreme Court.

It did so with knowledge that Article VIII, Section 6 of the New York Stock Exchange Constitution requires arbitration of the present dispute in New York City, and that arbitrators are not bound to follow precedent or the law. *Loevinger, Antitrust Issues as Subjects of Arbitration*, 44 N.Y.U.L. Rev. 1085 (1969); *Aksen, Arbitration and Antitrust—Are They Compatible?* 44 N.Y.U.L. Rev. 1097 (1969). Under California law, the *Frame* Court did not and could not compel arbitration in California thereby losing jurisdiction to enforce its decision. *California Code of Civil Procedure* §1293; *Weiman v. Superior Court*, 51 Cal.2d 710, 712, 336 Pac.2d 489 (1959). Moreover, New York arbitrators would not be duty bound to follow the decisions of the California courts in either *Ware* or *Frame*.

Petitioner's wholesale reliance on *Frame* is totally misplaced. The *Frame* decision was based on an erroneous interpretation of Rule 347(b). Not only did the *Frame* Court fail to consider Article VIII of the Exchange Constitution, it omitted any discussion of the interaction of federal statutory law, 15 U.S.C. §§78f(a)(1), 78bb(a) and 78cc on the waiver provision. Further, California Labor Code §229 was not even

<sup>10</sup>Having accepted the ruling in *Frame* that its forfeiture clause was illegal under §16600, petitioner would seem to be foreclosed by the doctrine of collateral estoppel from asserting a contrary position in this case. *Bernhard v. Bank of America, N.T. & S.A.*, 19 Cal.2d 807, 122 P.2d 892 (1942); *Blonder-Tongue Lab., Inc. v. University of Illinois Found'n*, 402 U.S. 313 (1971).

mentioned. The *Frame* decision likewise is contrary to the weight of established California and federal law regarding the non-arbitrability of questions of illegality.

Questions of illegality in California are not subject to the arbitration process despite agreements to the contrary. *Alpha Beta Mkts. v. Amal. Meat Cutters*, 147 Cal.App.2d 343, 350, 305 P. 2d 163 (1956).

The mandate of the California Supreme Court is unequivocal:

"The laws in support of a general public policy and in enforcement of public morality cannot be set aside by arbitration, and neither will persons with a claim forbidden by the laws be permitted to enforce it through the transforming process of arbitration.' . . . To hold otherwise would be tantamount to giving judicial approval to acts which are declared unlawful by statute . . ." (Citations omitted.)

*Loving & Evans v. Blick*, 33 Cal.2d 603, at pp. 611, 612, 204 P.2d 23 (1949).

The ruling of *Loving & Evans* is remarkably similar to that of this Court in *Kelly v. Kosuga*, 358 U.S. 516 (1959), wherein it was held that the courts would not enforce an illegal contract where it is obvious such action would " . . . make the courts a party to the carrying out of one of the very restraints forbidden . . ." at p. 520.

Merrill Lynch, in its opening brief before the California Court of Appeal, conceded that if that Court found the forfeiture provision illegal, arbitration would be precluded. (2R. Exh. A, p. 55).

Neither the holding in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403, n.9 (1967), nor Section 301(a) of the Labor Management Relations Act of 1947 are instructive in the context of this lawsuit.

*Prima Paint* was commenced in a federal court by reason of diversity.<sup>11</sup> The Court at p. 405 restricted its ruling to the narrow ground of "... how federal courts are to conduct themselves ..." when confronted with an arbitration agreement involving interstate commerce. Further, the issue in *Prima Paint* related to fraud in the inducement of the underlying agreement rather than to illegality and antitrust violations, which are deemed valid defenses to arbitration.

Section 301(a) of the Act of 1947 applies only to arbitration agreements contained in collective bargaining agreements and is irrelevant to this controversy. Those labor agreements are independently enforced under §301 without reference to the Federal Arbitration Act. *General Electric Co. v. Local 205, et al.*, 353 U.S. 547 (1957). *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957).

<sup>11</sup>Merrill Lynch cannot remove *Ware* at this juncture of the case in light of the mandatory provisions of 28 U.S.C. §1446(b). Merrill Lynch was served on January 27, 1970 and its answer filed April 17, 1970. (1 R. 51)

## II

**CALIFORNIA BUSINESS AND PROFESSIONS CODE SECTION 16600 DOES NOT INTERFERE WITH FEDERAL POLICIES CONCERNING THE REGULATION OF THE SECURITIES INDUSTRY.**

Article 11.1 of the Merrill Lynch profit sharing plan provides that an employee's interest in the profit sharing trust, whether vested or not, shall be forfeited if he voluntarily terminates his employment and accepts a position with a Merrill Lynch competitor, anywhere in the world within six months of such termination. (App. 38).

Under California statutes, such a forfeiture provision constitutes an unlawful restraint on an individual employee's right to engage in a lawful profession. *Muggill v. Reuben H. Donnelly Corp.*, 62 Cal.2d 239, 398 P.2d 147 (1965); *Frame v. Merrill Lynch*, 20 Cal. App.3d 668, 97 Cal. Rptr. 811 (1971); *Davis v. Jointless Fire Brick Co.*, 300 F. 1 (9th Cir. 1924). The *California Business and Professions Code*, §16600, is very specific:

"Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade or business of any kind is to that extent void." (Emphasis added)

Merrill Lynch argues that §16600, as well as §229, must be ruled invalid as applied to employers in the securities industry. Merrill Lynch is asking this Court to determine that the California statutes are unconstitutional as applied to its dealings with its employees. The real issue, then is whether Congress in enacting

federal securities legislation meant to preempt state legislation of the type here involved. Congress had no such intent.

The policy of open competition is a significant interest which the State of California has the power and right to promote. Federal antitrust legislation does not preclude complementary and supplementary state regulation. *Standard Oil Co. of Ky. v. Tennessee*, 217 U.S. 413 (1910); *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86 (1909).

Indeed, it has been recognized that some problems concerning protection of competition are best left to state regulation. *Stern, A Proposed Uniform State Antitrust Law: Text and Commentary On a Draft Statute*; 39 Texas L. Rev. 717 (1961). This would be particularly true in a case such as this one which deals with anti-competitive restraints on an individual's pursuit of his lawful trade or profession. Here, vigorous state antitrust enforcement is a valuable complement to federal antitrust policy. *Stern, supra*, 39 Texas L. Rev. at pp. 718-719. *Blake, Employee Agreements Not to Compete*, 73 Harv. L. Rev. 625, 628, n. 8 (1960).

Clearly, Article 11.1 of Merrill Lynch's profit sharing plan is designed to discourage its employees from going to work for competing firms.<sup>12</sup> Merrill Lynch

<sup>12</sup>Whether this provision violates federal antitrust laws is collateral. The contract unquestionably violates the California law protecting the mobility of employees' right to work and prohibiting anti-competitive restrictions on employment mobility. *Muggill v. Reuben H. Donnelly Corp., supra*. Moreover, in its Petition for Writ of Certiorari (Pet. Brief, pp. 13-14), Merrill Lynch concedes that five of its competitors in the securities field have similar re-

conceded this to be one of its purposes in its Petition for Writ of Certiorari (Petition, pp. 12-13.) There can be little doubt that the plan has had the intended effect. Merrill Lynch employees are seriously handicapped from taking competing jobs within the industry by threat of forfeiture of substantial vested financial interests.

The first question for the Court is whether the policy of free and open competition (mobility of brokers and employees among competing firms) in any way interferes with federal regulation of the securities industry. The starting point for resolving this issue " . . . is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted." *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963).

"The Securities Exchange Act contains no express exemption from the antitrust laws or, for that matter, from any other statute. This means that any repealer of the antitrust laws must be discerned as a matter of implication, and '[i]t is a cardinal principle of construction that repeals by implication are not favored' . . . . *Repeal is to*

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restrictions on employees. If all six firms have combined and conspired to establish a device for the anti-competitive restriction of broker-employee services, such would constitute a violation of federal antitrust statutes. (Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2). Similar plans have been held contrary to the Sherman Act in *Anderson v. Shipowners' Ass'n. of Pacific Coast*, 272 U.S. 359 (1926) and *Union Circulation Co. v. Federal Trade Com'n*, 241 F.2d 652 (2nd Cir. 1957) where the Court noted, "Under the Federal Trade Commission Act, industry agreements and practices have been enjoined without an actual showing of injury to competition in order to extinguish monopolistic practices before injury occurs. See *Fashion Originators' Guild of America, Inc., et al. v. F.T.C.*, 1941, 312 U.S. 457, 468, . . .; *F.T.C. v. Raladam Co.*, 1931, 283 U.S. 643. . . ." at p. 657.

be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes." (Emphasis added) (Citations omitted) 373 U.S. at p. 573.

The Securities Exchange Act, then, does not preclude the California legislation in question. Indeed, as emphasized, federal legislation [15 U.S.C. §78f(c)] requires that all rules adopted by stock exchanges (and therefore, by firms under the authority of such exchanges) conform to appropriate state laws, for "There is nothing built in to the regulatory scheme which performs the antitrust function of insuring that an exchange will not in some cases apply its rules so as to do injury to competition which cannot be justified as furthering legitimate self-regulative ends." *Silver*, 373 U.S. at pp. 358-359.

In light of this language from *Silver*, the California legislation protecting employees' rights to wages and mobility among competing firms does not oppose the purposes and operation of the Securities Exchange Act. The forfeiture provision in the Merrill Lynch profit sharing plan is neither authorized nor protected by any federal law or policy. Nor is it required by New York Stock Exchange rules or regulations. The forfeiture provision is thus not "... necessary to make the Securities Exchange Act work." (*Silver*, 373 U.S. at p. 357).

Accordingly, it cannot be held immune from judicial scrutiny by reason of *Silver* and the rulings by

this Court on identical issues which have arisen in other industries regulated by federal agencies. In cases such as *Carnation Co. v. Pacific Westbound Conf.*, 383 U.S. 213, 218 (1966) and *United States v. Radio Corp. of America*, 358 U.S. 334 (1959), administrative regulation of governmentally created quasi-monopolies did not preempt federal antitrust laws except in those limited instances in which the government deliberately and expressly prohibited some aspect of open competition, thereby immunizing only those specific private practices. See also: *Pan American World Airways, Inc v. United States*, 371 U.S. 296, 305 (1963); *Hughes Tool Co. v. Trans World Airlines, Inc.*, \_\_\_ U.S. \_\_\_, 93 S.Ct. 647 (1973). No more extensive immunity can or should be articulated by the courts.

"We have long recognized that the antitrust laws represent a fundamental national economic policy and have therefore concluded that we cannot lightly assume that the enactment of a special regulatory scheme for particular aspects of an industry was intended to render more general provisions of the antitrust laws wholly inapplicable to that industry."

*Carnation Co. v. Pacific Westbound Conf.*, 383 U.S. at p. 218.

Pursuant to this principle, antitrust laws have been applied against defendants in the regulated industries even though the conduct forming the basis of the antitrust claim had been approved by an administrative agency:

(a) *United States v. Radio Corp. of America*, 358 U.S. 334 (1959) (F.C.C. approval was a decision

that defendants' conduct would not violate the "public interest, necessity or convenience" and had no bearing on subsequent civil antitrust action).

(b) *California v. F.P.C.*, 369 U.S. 482 (1962) (F.P.C. approval of a merger did not confer antitrust immunity even though the F.P.C. had taken the competitive factor into account prior to passing upon the merger application).

(c) *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963) (Bank merger approved in advance by U. S. Comptroller of Currency pursuant to an Act of Congress was held not to immunize such merger from the antitrust laws—even though the Comptroller duly considered the possible anti-competitive effects of the merger).

(d) *Otter Tail Power Co. v. United States*, 409 U.S. 820, (1973) (The authority and jurisdiction of the F.P.C. to encourage and order interconnections if necessary or appropriate in the public interest does not preclude the maintenance of an antitrust action arising out of the defendant's refusal to make such interconnections. This Court recognized that judicial action did not conflict with the regulatory responsibilities of the F.P.C., even though that federal agency itself has the authority to make decisions on the basis of antitrust considerations).

Cf. *United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290, 314-315, (1897); *United States v. Joint Traffic Ass'n.*, 171 U.S. 505 (1898); *Northern Securities Co. v. United States*, 193 U.S. 197 (1904); *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439 (1945);

*Northern Pacific R.R. Co. v. United States*, 356 U.S. 1 (1958).

Immunity is created only in those limited instances where Congress has found that open competition—as to certain specified practices—is not in the public interest and, therefore, the legislature commands the parties to pursue a specific course of otherwise anti-competitive conduct (e.g., rate setting, division of markets, etc.)

In a few rare instances, Congress has expressly provided that certain types of advance federal administrative authorization will immunize conduct from anti-trust sanctions. *Hughes Tool Co. v. Trans World Airlines, Inc.*, \_\_\_ U.S. \_\_\_, 93 S.Ct. 647, 657-658 (1973); *Carnation Co. v. Pacific Westbound Conference*, *supra*; *Pan American World Airways, Inc. v. United States*, *supra*. But this Court noted that under regulatory schemes such as those supervised by the Federal Maritime Commission, the Civil Aeronautics Board and the Interstate Commerce Commission, grants of Congressional immunity were narrow and antitrust laws not completely displaced, 371 U.S. at p. 305.

In *United States v. Radio Corp. of America*, *supra*, after examining the power delegated to the Federal Communications Commission by Congress, the Supreme Court ruled:

“Thus, the legislative history of the Act reveals that the Commission was not given the power to decide antitrust issues, as such, and that Commission action was not intended to prevent enforcement of the antitrust laws in federal courts.” (358 U.S. at p. 346.)

In light of this uniform and consistent line of authority, the present forfeiture clause cannot possibly be immune from antitrust sanctions. It has not even been considered, much less approved, by the Securities and Exchange Commission. A private contractual provision is certainly not more effective in granting antitrust immunity than broad ranges of regulations by official federal agencies.

To hold Article 11.1 immune from judicial scrutiny necessarily means that nearly each and every activity of securities firms would be exempt from antitrust sanctions and judicial intervention. That ruling would not only require overruling *Silver*, but would effectively preclude the application of the Sherman Act as well as all applicable state laws to the regulated industries.

Such broad and undefined immunity is not available, even in the maritime and airline industries, where Congress has granted appropriate federal agencies the power to immunize specific industry conduct. Recently in *Hughes Tool Co. v. Trans World Airlines*, *supra*, this Court found actions of Hughes Tool Company exempt from antitrust sanctions only after determining that the Civil Aeronautics Board had issued orders approving before the fact the very conduct which formed the basis of Trans World Airlines' complaint and that Congress specially immunized such action under 49 U.S.C. §1384.

In response to this unequivocal line of cases rejecting antitrust immunity for the regulated industries, Merrill Lynch can cite only *Flood v. Kuhn*, 407 U.S.

258 (1972) which is clearly distinguishable from our present situation. In *Flood*, this Court held professional baseball's reserve system exempt from antitrust regulation. In so doing, the Court recognized that its decision was an "aberration" (407 U.S. 258 at pp. 282-284) and was, perhaps, illogical since antitrust coverage had been extended to other professional sports. *United States v. International Boxing Club*, 348 U.S. 236 (1955); *Radovich v. National Football League*, 352 U.S. 445 (1957); *Haywood v. National Basketball Association*, 401 U.S. 1204 (1971).

The Court nevertheless felt bound to exempt baseball from federal antitrust laws because of granting such immunity [*Federal Baseball Club v. National League*, 259 U.S. 200 (1922); *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953)] and the "positive inaction" of Congress in refusing to legislatively change this situation even though invited to do so by this Court.

Since its 1953 decision in *Toolson*, *supra*, more than fifty bills have been introduced in Congress concerning baseball's antitrust coverage. 407 U.S. 258 at p. 281. Congressional refusal to modify *Federal Baseball* and *Toolson*, then, was necessarily construed as Congressional approval of the antitrust immunity.

On the other hand, Congress has not—either expressly or implicitly—granted antitrust immunity for private businesses in the securities industry. Congress's "positive inaction" in the ten years since *Silver* was decided, amounts to its acceptance of the application of antitrust sanctions in the securities indus-

try, and the need for judicial safeguards. This Court's decision in *Silver* applying antitrust laws within the securities industry has received Congressional approval by the Senate subcommittee which recently concluded a lengthy examination of industry practices.

During these hearings, the Securities and Exchange Commission took the position that it should have jurisdiction to decide whether an exchange rule was necessary to make the Exchange Act work. The Securities and Exchange Commission asserted "that this power is necessary to prevent judicial interference that would upset the regulatory scheme of the Exchange Act." The Senate Subcommittee concluded that to vest such authority in the Securities and Exchange Commission would be antithetical to "the decided cases involving the securities industries and other related industries." B.N.A. *Securities Regulation & Law Report* No. 190, E-6, February 21, 1973.

The present action cannot, therefore, be held precluded by federal regulation in the securities field. Neither the Merrill Lynch forfeiture provision nor the New York Stock Exchange compulsory arbitration rule (as applied to employer-employee wage disputes) has been shown to be necessary (or, for that matter, even desirable) to federal securities policies.

In *Ware* as in *Silver*, *supra*, and *Thill*, *supra*, there is no evidence that the rules and practices challenged by respondents concern matters over which the Securities and Exchange Commission could exercise adequate review. *Thill Securities Corp. v. New York Stock Exchange*, 433 F.2d 264 (7th Cir. 1970).

In *Ricci v. Chicago Mercantile Exchange*, \_\_\_ U.S. \_\_\_, 93 S.Ct. 573 (1973), the limitations placed upon the Securities and Exchange Commission by Congress "to review specific instances of enforcement of Exchange rules" were confirmed. At p. 580, Ricci, a member of the Chicago Mercantile Exchange, was allegedly deprived of membership by said Exchange contrary to the Commodities Exchange Act, 7 U.S.C. 1 §1, et seq. and the rules of the Exchange. He alleged a conspiracy in violation of the Sherman Act. This Court stayed the judicial proceedings and referred the matter to the Commodities Exchange Commission to determine "whether the transfer of Ricci's membership was in violation of the Act for failure to follow Exchange rules." The Securities and Exchange Commission has no such similar authority.

The Court, however, explicitly stated that no prior agency ruling would foreclose the courts from deciding the antitrust question. The Commission would act only in an advisory capacity. Moreover, the Court found that Congress did not intend "the Act to confer general antitrust immunity on the Exchange and its members with respect to that area of conduct within the adjudicative or rule making authority of the Commission or the Secretary." *Id.* at p. 581 n. 13.

In his dissenting opinion, Justice Marshall, felt that the invocation of the doctrine of primary jurisdiction would derogate "from the principle that except in extraordinary situations, every citizen is entitled to call upon the judiciary for expeditious vindication of his legal claims of right." 93 S.Ct. at p. 589.

Contrary to the holding in *Ricci*, Merrill Lynch asks this Court to allow, not an independent federal agency or a Court, but rather, an arbitration board empaneled by the New York Stock Exchange to conclusively decide whether one of its own rules serves a valid self-regulatory purpose and, further, whether its most powerful and influential member firm pursues an anti-competitive and illegal policy in dealing with its employees through its profit sharing plan.

"The Securities Exchange Act of 1934 delegates to industry self-regulatory bodies quasi-governmental powers over their members. In so doing, the statute sanctions the concept of a group of competitors agreeing to impose restrictions upon themselves, including restrictions upon how they will compete with one another and restrictions affecting competitors who are not members of the group. This in turn creates the possibility that the group will use its power, intentionally or unintentionally, to limit competition or disadvantage non-member competitors in a way which does not further the purposes of the 1934 Act.

To protect the public and competitors against unjustified anti-competitive restrictions, the rules and actions of the self-regulatory organizations must be subject to review under antitrust standards." Senate Securities Sub-Committee Report, B.N.A., *Securities Regulation and Law Report* No. 190, E-6, February 21, 1973.

Finally, Merrill Lynch's demand for compulsory arbitration in this dispute ignores the rule that state and federal antitrust claims are not arbitrable. *Aksen, Arbitration and Antitrust—Are They Compatible?* 44 N.Y.U.L. Rev. 1097 (1969).

When confronted with the choice of arbitration in matters of strong public policy, the courts have unanimously held "... the broadest of arbitration agreements cannot oust our courts from their roles in the enforcement of major state policies, especially those embodied in statutory form..." *Matter of Aimcee Wholesale Corp.*, 21 N.Y.2d 621, 629, 237 N.E.2d 223 (1968). Federal law is in accord. *American Safety Equipment Corp. v. J. P. Maguire & Co.*, 391 F.2d 821 (2nd Cir. 1968); *Power Replacements, Inc. v. Air Preheater Co.*, 426 F.2d 980 (9th Cir. 1970); *A. & E. Plastik Pak Co. v. Monsanto Co.*, 396 F.2d 710 (9th Cir. 1968).

"Trial by jury, not by arbitrators, expert in other things, is 'an essential part of the Congressional plan for making competition rather than monopoly the rule of trade \* \* \*.'" *Silvercup Bakers, Inc. v. Fink Baking Corp.*, 273 F.Supp. 159 (S.D. N.Y. 1967); *Associated Milk Dealers v. Milk Drivers Union Local 753*, 422 F.2d 546 (7th Cir. 1970).

This rule has cogent application in the instant dispute. It is a question of law rather than fact whether a forfeiture provision contained in a profit sharing plan violates state or federal antitrust laws. Merrill Lynch cannot be allowed to hide its unlawful conduct behind the veil of an industry-dominated arbitration system.

## III

THE CALIFORNIA LEGISLATION HEREIN CHALLENGED DOES NOT CONSTITUTE AN UNDUE BURDEN ON INTERSTATE COMMERCE.

Merrill Lynch urges that by reason of the interstate aspects of its profit sharing plan, any disparity of treatment given such plan constitutes an impermissible burden on interstate commerce.<sup>13</sup>

No uniform application is required by either state or federal law. Professor Harlan M. Blake, in his extensive analysis of post-employment anti-competitive agreements, observed: "The moral for a draftsman is that generally when a multi-state restraint is required, it should satisfy the requirements of reasonableness of the most exacting state within the terms of the restraint." *Blake, Employee Agreements Not To Compete*, 73 Harv.L.Rev. 625, 688, n. 211 (1960).

Merrill Lynch contends that there is an important interest in national uniformity in regulating businesses in the securities industry, but California has not attempted by the decision in *Ware* to control any aspect of petitioner's securities business.

What national interest demands national uniformity in employer-employee relations in the securities industry? Who is to set these national standards?

<sup>13</sup>Petitioner did not advise this Court that by letter dated October 22, 1972, Merrill Lynch discontinued the operation of its profit sharing plan and agreed to pay to all employees terminated after that date one hundred percent (100%) of the monies credited to their respective accounts, whether or not they resigned and secured competitive employment. California employees who have left Merrill Lynch since October, 1972, have likewise received their profit sharing interests regardless of entering competitive activity.

(Neither Congress nor the Securities and Exchange Commission has established standards.) Are these to be set by the employer-dominated New York Stock Exchange? Or by each internationally-organized brokerage house? Is a sovereign state helpless and impotent in its attempt to protect employees in their dealings with economically superior employers?

Numerous leading decisions by this Court, such as *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pacific Railroad Co.*, 393 U.S. 129 (1968); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960); and *Parker v. Brown*, *supra*, are instructive by analogy in proving that the California statutes in issue do not constitute an undue burden on interstate commerce.

In the *Brotherhood of Firemen* case, a group of interstate railroads attacked an Arkansas statute requiring full crews (including at least one fireman) on each train. Like Merrill Lynch here, the railroads argued that they were organized on an interstate basis, where the need for uniformity in the interstate transportation industry was essential. Notwithstanding, this Court upheld the Arkansas full crew law on the ground that it promoted a valid state interest in safety, (393 U.S. at p. 140). The evidence concerning the safety value of firemen was—at best—mixed and Congress had referred the entire full crew dispute to an arbitration board. (393 U.S. at p. 134).

The same conclusion follows from the *Huron Cement Co.* case, *supra*. Even though Congress had established standards, required inspections and au-

thorized certificates as to Huron's steamships and other vessels in interstate commerce, a local ordinance enacted for the purpose of minimizing air pollution, and imposing more stringent specifications, was upheld by this court. (362 U.S. at p. 448). Merrill Lynch has not demonstrated that the forfeiture provision is *required* by the laws of any other state in which it transacts business, or by federal law.

Likewise, in *Parker v. Brown, supra*, state action which seemed to clearly burden interstate commerce by imposing anti-competitive marketing restrictions on the interstate sale of raisins was held valid, as being consistent with federal policies dealing with other aspects of the agricultural industry. (316 U.S. at pp. 352-358).

Merrill Lynch's reliance on *Flood v. Kuhn*, 407 U.S. 258 (1972) as support for its argument that state antitrust legislation burdens interstate commerce in the securities industry is mistaken. This Court's refusal to apply state antitrust laws to baseball in *Flood* was based on a finding that Congress by its "positive inaction" had demonstrated its intent that baseball's reserve system was to be immune from all antitrust laws. Congressional intent controls the application of antitrust regulation.

In our present case, Congress has mandated that stock exchanges and their member firms operate within state regulation. Moreover, the California laws in issue are consistent with federal policies banning anti-competitive restraints; complement and reinforce federal antitrust policy in its application to practices

within the securities industry; and do not constitute undue burdens on interstate commerce.

The mere fact that a business is engaged in interstate commerce and that the state law imposes some restraint on that business or its commerce "... does not add up to an unconstitutional burden on interstate commerce." *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424, 428 (1963). In *Head*, the Court found it important that "... appellants ... pointed to no regulations of other states imposing conflicting duties, nor can we readily imagine any." 374 U.S. at p. 429 citing *Colorado Anti-Discrimination Comm'n. v. Continental Air Lines*, 372 U.S. 714 (1963).

One who challenges the constitutionality of state statutes bears the onus of proving that an unreasonable burden on commerce has been created. That responsibility has not been discharged in the present case. It has not been shown that the California legislation exceeds the limits necessary to vindicate an important state interest; or that it unreasonably favors local businesses at the expense of out-of-state competitors; or that it attempts to regulate and control conduct beyond state borders. *Florida Lime & Avocado Growers, Inc. v. Paul*, *supra*, 373 U.S. at p. 154.

In *Collins v. American Buslines*, 350 U.S. 528 (1956), respondent, an interstate carrier, asserted that to compel it to comply with different state Workmen's Compensation Insurance requirements created an impermissible burden on interstate com-

merce. Merrill Lynch's contention can be dispatched in the same manner as was the argument in *Collins*.

"Whatever dollars-and-cents burden an eventual judgment for the claimants in the position of petitioners may cast . . . is insufficient, compared with the interest of the State in affording remedies for injuries committed within its boundaries . . . to dislodge state power . . ." 350 U.S. at p. 531.<sup>14</sup>

The underlying state interest in prohibiting restraints of trade, the common law forerunner of the Sherman Act is significant. "The public's stake in wide disseminations of such decisions is too great to allow them to be submerged in the anonymity of the arbitration process." *Pitofsky, Arbitration and Anti-trust Enforcement*, 44 N.Y.U.L. Rev. 1072, 1077 (1969).

The philosophy underlying §16600 can be summarized as follows:

... post employment restraints reduce both the economic mobility of employees and their

<sup>14</sup>*Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959) is inapposite. In *Bibb*, trucks equipped with mud guards as required by Illinois law were prohibited from the roads of another state. In *Bibb*, as in *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945), the state's regulations of transportation industries could not be justified since the evidence demonstrated that the statutory requirements created greater safety hazards. Thus, the free flow of commerce was impeded and no state interest was promoted. Moreover, as this Court made clear in its ruling in *Florida Lime & Avocado Growers, Inc. v. Paul*, *supra*, the state laws in *Bibb* and *Southern Pacific* were struck down because they sought to control the conduct of the regulated parties beyond the borders of the regulating states. 378 U.S. at p. 154.

None of these considerations apply to the California legislation involved in the present case.

personal freedom to follow their own interests. These restraints also diminish competition by intimidating potential competitors and by slowing down the dissemination of ideas, processes, and methods. They unfairly weaken the individual employee's bargaining position vis-a-vis his employer and, from the social point of view, clog the market's channeling of manpower to employments in which its productivity is greatest." *Blake, Employee Agreements Not To Compete*, 73 Harv.L.Rev. 625, 627 (1960).

The author was of the opinion that given the required effect on commerce, such restraints would be violative of the Sherman Act. (At p. 628).

This Court has condemned similar arbitration agreements which in and of themselves were used as vehicles to protect violators from antitrust actions. *Paramount Famous Lasky Corp. v. U.S.*, 282 U.S. 30 (1930); *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935). The same situation concerns the Court today. Merrill Lynch and the New York Stock Exchange operate within an admitted anti-competitive environment. In an effort to insulate their dealings from judicial scrutiny, the Exchange and its "club members" have established blanket arbitration rules which in no manner further the purposes of the Securities Exchange Act. "Such unjustified self-regulatory activity can only diminish public respect for and confidence in the integrity and efficacy of the exchange mechanism." *Silver v. New York Stock Exchange*, 373 U.S. 341, 359 (1963).

In the final analysis, burdens on interstate commerce must be measured by the extent to which state legislation conforms or conflicts with Congressional intent (express or implied) concerning regulation of the field involved. *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946). Here both this Court and Congress have overwhelmingly signified approval of the type of state action reflected in the California legislation under consideration.

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#### CONCLUSION

For the foregoing reasons it is respectfully submitted that the order and decision of the Court below should be affirmed.

Dated, San Francisco, California,

May 17, 1973.

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